No. 86-1513

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

REUBEN PALMER, KEITH SYKES, JONATHAN CHILDRESS, ALAN KENT, DENNIS WILLIAMS, JAMES SAYLES, ERIC STANLEY,

Sub-Class A Plaintiffs,

EDWARD NEGRON, JACKIE WILSON, SHERYL THOMAS, ANDREW WILSON, RICHARD HILLSON, KEVIN FLEMING, a minor, ALFONSO ALVAREZ, GLADSTONE THOMPSON, MARCUS CARR, MICHAEL BROWN, MICHAEL MADDEN,

Sub-Class B Plaintiffs,

Petitioners,

vs.

CITY OF CHICAGO; RICHARD BRZECZEK, Superintendent, Chicago Police Department; and Commander MILTON DEAS,

Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JEREMIAH MARSH
WM. CARLISLE HERBERT
JAMES D. OSSYRA
HOPKINS & SUTTER
Three First National Plaza
Suite 4100
Chicago, Illinois 60602
(312) 558-6600

Attorneys for Respondent City of Chicago

CHAS. P. YOUNG COMPANY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

QUESTION PRESENTED FOR REVIEW

The "Question Presented For Review" as stated by the Petitioners does not correctly state the issue that was before the Court of Appeals, primarily because there was no finding of a constitutional violation by the District Court. Correctly stated, the question presented is whether the Plaintiffs are "prevailing parties" entitled to attorneys' fees under 42 U.S.C. § 1988 where the Plaintiffs' lawsuit prompted the Defendant City to undertake certain reforms demanded by the Plaintiffs but where the Defendant City consistently denied that the Plaintiffs were entitled to federal judicial relief and ultimately obtained a court determination that they were not entitled to federal judicial relief.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

REUBEN PALMER, KEITH SYKES, JONATHAN CHILDRESS, ALAN KENT, DENNIS WILLIAMS, JAMES SAYLES, ERIC STANLEY,

Sub-Class A Plaintiffs,

EDWARD NEGRON, JACKIE WILSON, SHERYL THOMAS, ANDREW WILSON, RICHARD HILLSON, KEVIN FLEMING, a minor, ALFONSO ALVAREZ, GLADSTONE THOMPSON, MARCUS CARR, MICHAEL BROWN, MICHAEL MADDEN,

Sub-Class B Plaintiffs,

Petitioners,

vs.

CITY OF CHICAGO; RICHARD BRZECZEK, Superintendent, Chicago Police Department; and Commander MILTON DEAS,

Respondents.

STATEMENT OF THE CASE

Proceedings on the Merits

The instant case was a suit under 42 U.S.C. § 1983 to reform the record-keeping practices in the Detective Division of the Police Department of Defendant City of Chicago ("City"), alleging that such practices had violated the constitutional rights of criminal defendants by withholding exculpatory information from them. For many years, the City's detectives in the investigation of violent crimes had maintained working files containing notes and informal memos as well as official investigation reports. The Detective Division did not have regulations concerning the retention of notes, and these were frequently discarded after official reports

were prepared. The failure to retain notes increased to some degree the risk that the detectives might obtain information raising a reasonable doubt as to a defendant's guilt and yet fail to disclose such information to the defendant, and it thus posed some risk of unconstitutional harm to defendants in violent crime proceedings. After examining the existing working files during the course of this action, however, the Plaintiffs were unable to establish any unconstitutional harm to themselves or to the class members they represented.

This action was brought on behalf of two classes of individuals who claimed to have standing to seek reform of the Detective Division's record-keeping practices: (a) individuals who had been convicted of committing violent crimes and (b) individuals who were awaiting trial in state court on charges of committing violent crimes. During the pendency of this case, the Police Department undertook an investigation of the record-keeping practices of the Detective Division, but no regulations had been adopted when the case was heard on Plaintiffs' request for a preliminary injunction. At the hearing, the Plaintiffs presented as evidence certain self-critical memoranda that had been prepared by the Police Department in its investigation of the record-keeping problem, and they called the City's Police Superintendent as a witness. In his testimony, the Superintendent stated that he believed reform of the Detective Division's record-keeping practices was necessary, and the District Court continued the hearing to allow the Police Department to draft new regulations in accordance with the Superintendent's views.

After the regulations were drafted, the District Court proposed that they serve as a basis for a consent decree, and the City objected. The City had consistently denied that the Plaintiffs' suit had any merit whatsoever. The City denied that the Plaintiffs' constitutional rights had been violated; the City denied that its record-keeping practices had posed anything more than a speculative possibility of unconstitutional harm to any of the Plaintiffs; and the City pointed out

that the Plaintiffs had an adequate remedy for any specific threats of unconstitutional harm in their state criminal proceedings.

The District Court ordered that the preliminary injunction hearing be resumed, and the Police Department proceeded to issue its proposed regulations. After the hearing was concluded, the District Court issued a preliminary injunction adding new requirements to the Police Department's regulations. The District Court based its injunction on a finding that the Detective Division's record-keeping practices posed "a grave risk . . . of the violation of constitutional rights." 562 F.Supp. at 1076. Among other things, the District Court added to the new regulations a requirement that detectives "take and maintain complete notes of all relevant matters during the course of their investigation . . . . " 562 F.Supp. at 1081.

On appeal, the Seventh Circuit reversed the preliminary injunction issued by the District Court. The Court held that (a) those class members who had been convicted lacked standing because the risk of future harm to them arising out of the Detective Division's record-keeping practices was too speculative and (b) the District Court should abstain from considering the claims of those who were awaiting trial because they could present their constitutional claims in the state proceedings. The Court of Appeals allowed the lawsuit to proceed, but only as a possible action for damages on behalf of those class members who had been convicted of violent crimes and only if they could establish that they had in fact been subjected to unconstitutional harm because of the detectives' earlier record-keeping practices.

In its opinion, the Court of Appeals emphasized that the Plaintiffs were not entitled to an injunction imposing a general standard of record-keeping on the Police Department. The Court stated, "The Federal courts have no business whatsoever meddling in or attempting to control the

daily maintenance and administration of the [Police Department] and the Cook County State's Attorney's Office, absent a clear and defined constitutional violation." 755 F.2d at 578.

On remand, the Plaintiffs took no further action to prosecute the case. Nor did the Plaintiffs present any constitutional claims in the state criminal proceedings for any class member. As they later admitted, even before the first appeal had been briefed and argued, the Plaintiffs' counsel had examined the existing working files and they had found no exculpatory information in such files.

The City moved the District Court to decertify the class in preparation for a motion to dismiss the case, but the District Court declined to rule on the motion to decertify pending the outcome of the pending appeal concerning attorneys' fees. The District Court later dismissed the action for lack of prosecution, but it entered and continued a motion for reinstatement by the Plaintiffs. At oral argument before the Court of Appeals on the attorneys' fees issue, the Plaintiffs' counsel finally conceded on the record that they had found no exculpatory information in the existing working files and that they had abandoned prosecution of the action.

Proceedings on Fees

After the District Court had entered its preliminary injunction, Plaintiffs moved for an interim award of attorneys' fees under 42 U.S.C. § 1988. The District Court entered an award, in the amount of $113,000, which it declared would stand irrespective of whether the preliminary injunction was reversed. The District Court based the award on a finding that the Plaintiffs' lawsuit had caused the Police Department to reform its record-keeping practices and had thus provided substantial relief from the conditions that had prompted the Plaintiffs to bring the action.

On appeal, the Seventh Circuit reversed the District Court's award of attorneys' fees with directions to dismiss the fee petition and with a suggestion that the District Court

dismiss the Plaintiffs' motion to reinstate the case. Because the Plaintiffs had been denied injunctive relief compelling the reforms that they had sought by bringing the suit, the Court stated, "The question we are asked to decide is whether, for purposes of section 1988, you can win by losing." 806 F.2d at 1316. As the Court summarized the lawsuit:

> The plaintiffs in this case brought suit in the wrong court and the suit was thrown out, for good, except for a discovery-type order which proved in the end to have no value. As a matter of fact it is now clear, as it was not when we reversed the grant of the preliminary injunction, that the plaintiffs' claim has no substantive merit, as well as having been brought in the wrong court. The claim depends on there being exculpatory material in the street files—and there isn't any. The suit has been abandoned because it has been shown to have, in fact, no legal merit.

Id. at 1324. Under these circumstances, the Court held, the Plaintiffs are not "prevailing parties" within the meaning of 42 U.S.C. § 1988.

REASONS WHY PETITION SHOULD NOT BE GRANTED

The Seventh Circuit's decision in this case was correct, and it was fully consistent both with the existing case law on the award of attorneys' fees under 42 U.S.C. § 1988 and with the legislative history of this provision. The City will address the assertions made by the Plaintiffs in the same order in which they are set forth in the Petition for Certiorari.

1. Plaintiffs contend that the instant case presents an "important question" of first impression. In this case, the Plaintiffs seek attorneys' fees on the basis of practical success even though it has been established that their lawsuit had no merit. The reported cases on attorneys' fees under 42 U.S.C.

§ 1988, many of which are cited by the Plaintiffs in their petition, indicate that this circumstance is rare. While the federal courts of appeals in many cases have struggled with the challenging question of when someone can be a "prevailing party" in a case that has settled or become moot, few cases have arisen presenting the question whether someone can be a "prevailing party" in a case which he has lost. In those few cases, the courts of appeals have had little difficulty determining that the plaintiff is not a prevailing party. *See* the decision of the Seventh Circuit in the instant case, 806 F.2d 1316, attached to the Petition for Certiorari at App. 13; *Doe* v. *Busbee*, 684 F.2d 1375 (11th Cir. 1982). The question presented does not merit the attention of this Court.

2. Plaintiffs contend that the holding of the Seventh Circuit "creates a split in the Circuits as to the proper test for determining prevailing party status when a final determination on the merits is not determined but informal relief is obtained." The tests cited by the Plaintiffs, however, have been developed in cases which have settled or become moot, cases which present entirely different considerations from those which arose in the instant case.

In settlement and mootness cases, the courts have searched for ways to determine whether a plaintiff has "prevailed" for the purpose of awarding fees without having to hold a trial to determine whether the plaintiff's action had merit. In such cases, most courts, including the Seventh Circuit, have held that a plaintiff has prevailed if his lawsuit was not frivolous and it caused the desired change in circumstances. *See, e.g., Harrington* v. *DeVito*, 656 F.2d 264 (7th Cir. 1981); *Nadeau* v. *Helgemoe*, 581 F.2d 275 (1st Cir. 1978). In other words, the courts presume that the plaintiff's action had merit if these conditions are satisfied. As the Seventh Circuit stated in this case:

> When a suit is settled, the district judge doesn't want to be bothered determining whether or not it has merit, merely to determine the ancillary question of attorney's

> fees; so he asks only whether the suit was nonfrivolous, a simpler inquiry. But when the suit is not settled and ultimately fails, the judge has no need to make a separate inquiry into its merit. Merit has been determined; that determination controls the issue of attorney's fees.

806 F.2d at 1323.

Other courts have held that a plaintiff may recover fees after a lawsuit has settled or become moot if the plaintiff can show merely that the lawsuit caused the desired change in circumstances. *See, e.g., Fields* v. *City of Tarpon Springs*, 721 F.2d 318 (11th Cir. 1983); *Bonnes* v. *Long*, 651 F.2d 214 (4th Cir. 1981). Thus, in *Fields*, the Eleventh Circuit stated, "The catalyst test only demands that practical relief has been obtained that is factually a causal result of the lawsuit." 721 F.2d at 321. These courts presume that the plaintiff's action had merit if this single condition is met.

Where a plaintiff, however, has been defeated in his attempt to obtain judicial relief, no presumption that his suit had merit is justified, and he cannot be considered a prevailing party. Thus, in *Doe* v. *Busbee*, 684 F.2d 1375 (11th Cir. 1982), plaintiffs, who had obtained injunctive relief permitting more than 1,800 women to obtain medicaid-reimbursed abortions, were denied attorneys' fees after the injunction obtained by the plaintiffs was vacated. The injunction was vacated because this Court in unrelated cases had rejected the position that the plaintiffs had successfully advanced in the district court. The Eleventh Circuit explained that, "in order to be a prevailing party, a plaintiff must achieve significant relief to which he was entitled under the civil rights laws through his success on the merits, favorable settlement, or voluntary actions by the defendants . . . . [T]he plaintiffs ultimately did not prevail on a single legal issue in the case." *Id.* at 1381.

Similarly, in the instant case, no presumption that the Plaintiffs' action had merit is justified. After the Police

Department had issued the regulations upon which the Plaintiffs base their claim for attorneys' fees, the Plaintiffs continued to litigate until the Court of Appeals determined that their claims had no merit. This outcome established that the Police Department's issuance of new record-keeping regulations was gratuitous in relation to the Plaintiffs' lawsuit. "If it has been judicially determined that defendants' conduct, however beneficial it may be to plaintiffs' interest, is not required by law, then defendants must be held to have acted gratuitously and plaintiffs have not prevailed in a legal sense." *Nadeau* v. *Helgemoe*, *supra*, 581 F.2d at 281.

Indeed, since the Seventh Circuit vacated the preliminary injunction in this case, the Detective Division's retention of record-keeping regulations has been entirely voluntary. Moreover, the regulations are not permanent. They have been revised once since the first appeal, among other things to remove particular provisions required by the District Court that the Detective Division found objectionable, such as the unworkable requirement that detectives "take and maintain complete notes of all relevant matters during the course of their investigation." As time goes on, the regulations will surely be revised again, as record-keeping demands and methods change. The Detective Division is now on its own to meet its "responsibility . . . to draft policies and internal guidelines that incorporate [the] constitutional standard of preservation and assure criminal defendants the due process safeguard of a fair trial." 755 F.2d at 578.

The decision of the Seventh Circuit in this case is not in conflict with the decisions of other federal courts of appeals.

3. Plaintiffs assert that the Seventh Circuit's decision ignores the legislative history of 42 U.S.C. § 1988 quoted by this Court in *North Carolina Dept. of Trans.* v. *Crest St. Comm. Council, Inc.*, 107 S. Ct. 336, 340 (1986). It does not. There is nothing in the Court of Appeals' decision that denies that "parties may be considered to have prevailed when they vindicate rights through a consent judgment or without

formally obtaining relief" or that counsel fees may be awarded in the case of "an out-of-court settlement" or where a defendant has "voluntarily cease[d] the unlawful practice." The Seventh Circuit specifically discussed these types of cases. 806 F.2d at 1321, 1323; Petition for Certiorari App. 23-24, 28-29. In the instant case, there was no consent judgment and no out-of-court settlement, and the City's actions did not satisfy the Plaintiffs. The parties continued to litigate the case until the lack of merit in Plaintiffs' claims was established.

Plaintiffs also assert that the Court of Appeals' decision ignores the principles announced by this Court in *Maher* v. *Gagne*, 448 U.S. 122 (1980). Again, the Plaintiffs are not correct. In *Maher*, this Court approved an award of fees in a case that resulted in a consent decree, granting the plaintiff substantial relief. The Court stated, "The fact that respondent prevailed through a settlement rather than through litigation does not weaken her claim to fees." *Id.* at 129. In the instant case, as noted above, no settlement was reached.

Finally, Plaintiffs cite three court of appeals decisions, referred to in the legislative history of 42 U.S.C. § 1988, which Plaintiffs claim are without real distinction from the case at bar and undercut the Seventh Circuit's decision: *Kopet* v. *Esquire Realty Co.*, 523 F.2d 1005 (2d Cir. 1975); *Thomas* v. *Honeybrook Mines*, 428 F.2d 981 (3d Cir. 1970); and *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970). *Kopet* and *Thomas* were specifically discussed and distinguished in the Seventh Circuit's opinion. 806 F.2d at 1320, 1324; Petition for Certiorari App. 22, 29. Each case is easily distinguishable from the instant case.

In *Kopet*, the plaintiff prevailed on his federal law claims, thereby providing a predicate for fees that does not exist here. In *Thomas*, the intervenors who sought fees prevailed by substantially contributing to plaintiffs' recovery of judgments and settlements against the defendants, thereby providing a predicate for fees that does not exist here. And

in *Parham*, the plaintiff obtained court supervision over the defendant to assure that it continued to implement its affirmative action program, which supervision was predicated on a finding that the defendant had engaged in racial discrimination. Again, the plaintiff's success in obtaining judicial relief provided a predicate for fees that does not exist in the instant case.

There is nothing in the legislative history or in the cases cited by the Plaintiffs to suggest that a plaintiff who has been denied judicial relief can recover fees under Section 1988 because the defendant has taken action that the District Court could not or would not compel.

CONCLUSION

Wherefore, Respondent City of Chicago respectfully requests that the Plaintiffs' petition for a writ of certiorari be denied.

DATED: April 15, 1987

Respectfully Submitted,

JEREMIAH MARSH
WM. CARLISLE HERBERT
JAMES D. OSSYRA
HOPKINS & SUTTER
Three First National Plaza
Suite 4100
Chicago, Illinois 60602
(312) 558-6600
Attorneys for Respondent City of Chicago